IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 21, 2008

STATE OF TENNESSEE V. BENNY K. WEST

Appeal from the Criminal Court for Claiborne County
No. 13065 E. Shayne Sexton, Judge

No. E2007-02496-CCA-R3-PC - Filed October 2, 2008

Petitioner, Benny K. West, appeals the post-conviction court's decision to deny his petition for post-conviction relief. Petitioner entered a nolo contendere plea to two counts of sexual battery. Subsequently, he sought post-conviction relief on the basis of ineffective assistance of counsel and that his plea was unknowingly and involuntarily entered. After a hearing during which the post-conviction court heard testimony from Petitioner, trial counsel, and an employee of the Department of Children's Services, the post-conviction court denied the petition. After a review of the record, we determine that Petitioner did not prove that he received ineffective assistance of counsel or that his nolo contendere plea was unknowingly and involuntarily entered. Therefore, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Brian J. Hunt, Clinton, Tennessee, for the appellant, Benny K. West.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L.Bledsoe, Assistant Attorney General; William Paul Phillips, District Attorney General; and Jaren Effler, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On August 1, 2005, the Claiborne County Grand Jury indicted Petitioner for two counts of aggravated sexual battery. On December 9, 2005, Petitioner entered a nolo contendere plea to two counts of sexual battery. In exchange for the nolo contendere plea, Petitioner received an agreed sentence of ten years as a Range III persistent offender. At the plea submission hearing, the State presented the following factual basis for the indictments:

> As to Count One of the indictment, the proof would be that on or about December 6, 2002 through December 23rd, 2003, in Claiborne County, Tennessee, that [Petitioner] did unlawfully and feloniously have sexual contact with [the minor victim] while in the - - and the aforementioned contact was accomplished without [the minor victim's] consent, and the [Petitioner] knew or had reason to know at the time of this contact that the victim did not consent to such.
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> As to Count Two of the indictment, the State of Tennessee would - - would offer the following proof - - That on or about December 6, 2002 through December 23rd, 2003, in Claiborne County, Tennessee, that [Petitioner] did unlawfully and feloniously have sexual contact with [the minor victim], and the aforementioned contact was accomplished without the effective consent of [the minor victim], and the [Petitioner] knew or had reason to know at the time of this contact that [the minor victim] did not consent to such.
>
> More specifically, your Honor, the State would offer two exhibits to be considered by your Honor in finding [Petitioner] guilty beyond a reasonable doubt of two separate and distinct counts of sexual battery, the first being a statement provided by [Petitioner] to Ms. Allison Pettyjohn of the Department of Children's Services.
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> . . . .
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> And Exhibit Two for this hearing would be the statement of the victim . . . .[1]

Petitioner sought post-conviction relief by filing a pro se petition on October 20, 2006. In the petition, Petitioner alleged that his conviction was based on an unknowing and involuntary plea,

[1] The victim's statement indicated that she touched Petitioner's "private" and "some silver stuff come [sic] out" and that Petitioner put his hands down her skirt and underneath her underwear. Petitioner's statement claimed that the victim was the aggressor. Specifically, he claimed that the victim placed his hands in her underwear and that the victim touched his penis and gratified him sexually.

that his conviction was based on a violation of the privilege against self-incrimination, and that he received ineffective assistance of counsel. Specifically, Petitioner complained that his trial counsel: (1) did not interview eye-witnesses; (2) did not provide for proof of actual innocence or alibi; (3) did not communicate "prior plea agreement;" and (4) did not interview witnesses or the victim. Further, Petitioner asserted that he: (1) entered an unknowing and involuntary guilty plea; (2) did not understand the allocution hearing; (3) did not qualify for Range III sentencing: (4) did not receive notice of enhanced sentencing. Petitioner also claimed that there were due process violations, "6th Amendment issues," that his plea was based on coercion, and that his conviction was based "purely on hearsay and circumstantial evidence." The post-conviction court appointed counsel for Petitioner and counsel filed a memorandum of law in support of Petitioner's petition for post-conviction relief.

Evidence at the Post-conviction Hearing

At the hearing on the post-conviction petition, Petitioner testified that trial counsel was appointed to represent him after the indictment. Petitioner claimed that he waived his right to a preliminary hearing on the basis of a recommendation made by trial counsel. Petitioner stated that he spoke with trial counsel for about "three seconds" after he was appointed to the case. Petitioner initially thought that there was only one count of sexual battery, not two.

Petitioner stated that after the arraignment, he did not speak to trial counsel until April of 2005, about two months later. This time, he met trial counsel at a bail hearing. They did not discuss the case or the charges. Petitioner spoke with trial counsel in May for a "minute or two" at another hearing. Petitioner testified that he never spoke with an investigator or anyone else from the Public Defender's Office.

Petitioner reported that he saw trial counsel when his bond was revoked, but that they did not actually speak with each other. The next time he remembered talking to trial counsel was in September of 2005 when trial counsel informed him that the State was offering three years at thirty percent. Petitioner stated that he agreed to this deal. According to Petitioner, they talked for about five minutes but did not discuss anything else.

On December 9, 2005, when Petitioner appeared for the plea, he thought that he would be sentenced to three years at thirty percent. Trial counsel informed Petitioner that he was facing a twenty-five year sentence if the case went to trial.

In regard to the plea agreement, Petitioner claimed that he signed it but that he did not read it. When he signed the agreement, he thought that he was getting a three-year sentence. Petitioner also claimed that he did not know that he was pleading to reduced charges of sexual battery. Petitioner stated that trial counsel did not discuss the sentencing ranges with him.

Petitioner also informed the trial court about the statement he gave at the Department of Children's Services. Petitioner met with Allison Pettyjohn[2] after she called him and asked him to come into the office. Petitioner claimed that he asked if he needed an attorney and that Ms. Pettyjohn informed him that he did not need one. Petitioner was not told that they were investigating an allegation of abuse involving a girl that was in Petitioner's foster care. According to Petitioner, he made up the statement because Ms. Pettyjohn wanted him to do so but that nothing in the statement was true and he felt pressured into writing it.

When questioned on cross-examination, Petitioner admitted that, at the guilty plea hearing, he told the trial court that he was not "forced" or "threatened" into pleading guilty. On appeal, Petitioner claimed that this was a "slip of the tongue." Petitioner testified that he told the trial court at the plea hearing that he was satisfied with trial counsel's representation because, at that time, he thought that he was pleading in exchange for a three-year sentence at thirty percent.

Trial counsel testified that he had been licensed for nine years and had worked at the Public Defender's Office for seven years. During that time, he handled "thousands" of cases. Trial counsel testified that he spoke briefly with Petitioner prior to a bond revocation hearing. The only witness at the hearing was Petitioner's adopted son, who testified that Petitioner was living with him at the time.

According to trial counsel, he and Petitioner discussed strategy both before and after the revocation hearing. Trial counsel felt that Petitioner understood most things, however, he still intended to move for a forensic evaluation.

Petitioner's family initially raised the issue of mental competence and/or mental retardation. Trial counsel could not secure any documentation that Petitioner was mentally challenged. After a mental evaluation, it was determined that Petitioner was competent to stand trial.

Trial counsel stated that he did not force Petitioner to waive the preliminary hearing, but explained the "lightened" burden that the State had at a preliminary hearing and suggested that it would be better to waive it when the statement of Petitioner would likely come into evidence. Trial counsel felt that Petitioner understood this conversation.

Petitioner and trial counsel met in May of 2005 to review the DCS case file. Trial counsel filed a motion for discovery and, in return, received the DCS case file.

Trial counsel told the trial court about the initial plea offer from the State that was for twelve years at sixty percent. The State agreed to reduce the charges to "simple sex battery" which would reduce Petitioner's release eligibility from eighty-five to sixty percent. Petitioner suggested a counteroffer of ten years at forty-five percent. Petitioner then entered the plea on December 9, 2005.

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[2] At the time of the post-conviction hearing, Ms. Pettyjohn's last name had been changed to Jenkins. For consistency and clarity, we will refer to her as Ms. Pettyjohn throughout the opinion.

As a result, Petitioner received a five-year sentence on each count, to be served consecutively, for a total effective sentence of ten years.

Trial counsel remembered that someone from his office reviewed the plea with Petitioner. Trial counsel had no doubt that Petitioner understood what he was doing in entering the plea. Petitioner expressed no concerns about the plea. Trial counsel explained the release eligibility percentage to Petitioner.

On cross-examination, trial counsel stated that he felt like Petitioner's mental health needed to be investigated but that he did not find any documented inpatient mental health treatment and/or specific findings of mental retardation. Despite his concerns about Petitioner's mental health, trial counsel found Petitioner to be reasonable.

Allison Pettyjohn explained that she was an investigator for DCS in the Special Investigations Unit. She interviewed Petitioner in regard to allegations of sexual abuse by a foster child. Petitioner gave a statement during the interview that Ms. Pettyjohn asked him to write out in his own words. Petitioner never asked for an attorney and was free to leave at any time during the interview process. Ms. Pettyjohn denied coercing Petitioner into making a statement. There was no criminal investigation pending at the time of the interview.

At the conclusion of the post-conviction hearing, the court determined:

> This Court has, I guess, narrowed down the areas of incompetence claims by the - - by the petitioner in this case . . . .
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> In reviewing the evidence, this Court finds that there is no basis to grant relief on any of these grounds. It was - - it's made clear to the Court in today's proceedings that trial counsel [ ] did his level best to prepare for trial in this case in the form of interviewing witnesses or considering the witnesses that were named by the defendant and whether or not interviewing them would be meritorious.
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> There were hearings that are somewhat out of the norm in a case like this. There was a series of bond hearings brought before the two sitting Judges in the county, and each time - - and certainly on - - in the Criminal Court matter, [trial counsel] had the opportunity to examine State witnesses . . . .
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> [A]s far as the pretrial incompetence that may have been shown, the petitioner has shown none of that.
>
> I don't see anything on the face of the plea that would indicate petitioner not understanding what had occurred.

> The Court has also reviewed the transcript of the plea . . . and the Court has a very practiced routine about going through the process with each and every defendant that makes [an] appearance before this Court. . . . Reviewing the responses given by [Petitioner] throughout this hearing, it's abundantly clear that he understood the terms of this plea. That - - I suppose no - - nothing - - no mention was made, but this Court understands the nature of a nolo contendere plea, and by allowing the defendant . . . to not have to admit guilt meant that there was some thought about whether or not he could actually do that based on these charges. But, the State's submission of evidence, the quality of that evidence and [Petitioner's] response that he would allow that to be the evidence against him satisfy's [sic] this Court's concern that the defendant - - whether or not the defendant knowingly and intelligently understood what was going on at that hearing.
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> . . . .
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> Now, in sum and substance, the Court is denying the requested relief which would be to find that he was - he received ineffective assistance of counsel and to reset this case for trial. That relief will not be granted, and the conviction will stand, and the Court finds that there is no basis for relief on any ground in this matter.

Petitioner appeals the dismissal of the post-conviction petition.

Analysis

Post-conviction Standard of Review

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

On appeal, Petitioner argues that the post-conviction court erred in denying his petition because his guilty pleas were not entered knowingly, voluntarily and intelligently because he was afforded ineffective assistance of counsel. When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing by clear and convincing evidence that (a) the services rendered by trial counsel were deficient and (b) that the

deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996); *see also* T.C.A. § 40-30-110(f). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *State v. Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, Petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). As stated above, in order to successfully challenge the effectiveness of counsel, Petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *See Baxter*, 523 S.W.2d at 936. Under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the petitioner must establish: (1) deficient representation; and (2) prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of *Strickland*, Petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

When analyzing a guilty plea, we look to the federal standard announced in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the State standard set out in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In *Boykin*, the United States Supreme Court held that there must be an affirmative showing in the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. *Boykin*, 395 U.S. at 242. Similarly, our Tennessee Supreme Court in *Mackey* required an affirmative showing of a voluntary and knowing

guilty plea, namely, that the defendant has been made aware of the significant consequences of such a plea. *Pettus*, 986 S.W .2d at 542.

A plea is not "voluntary" if it results from ignorance, misunderstanding, coercion, inducements, or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is "knowing" by questioning the defendant to make sure he fully understands the plea and its consequences. *Pettus*, 986 S.W.2d at 542; *Blankenship*, 858 S .W.2d at 904.

The post-conviction court herein found that Petitioner did not prove his allegations by clear and convincing evidence. This conclusion is supported by the great preponderance of the evidence. Petitioner argues that his counsel failed to inform him as to the nature and consequences of his guilty plea. However, Petitioner's guilty plea colloquy, which is included in the record, demonstrates that he understood the plea agreement, and that the trial court again explained both the charges and the corresponding sentences. During the plea colloquy, Petitioner admitted that he was satisfied with trial counsel's representation and that he had not been coerced into pleading nolo contendere. However, at the post-conviction hearing, Petitioner claimed that his statements at the plea hearing were a "slip of the tongue" and that he did not understand the plea nor was he aware of the sentence. Trial counsel testified that someone from his office reviewed the plea agreement with Petitioner prior to the hearing and that Petitioner understood the plea. Petitioner did not present any proof other than his own testimony at the post-conviction hearing to corroborate his claims regarding the plea. The post-conviction court obviously rejected this testimony and accredited trial counsel's. As noted that was the court's perogative.

Petitioner also argues that trial counsel did not adequately investigate the case. However, this assertion is not borne out by the record. Trial counsel testified that he received discovery from the State and reviewed the DCS case file which contained the statements made by Petitioner and the victim. Trial counsel even had the opportunity to cross-examine Ms. Pettyjohn from DCS at one of the bail hearings prior to the plea hearing. This issue is without merit.

Petitioner also argues that trial counsel should have sought to suppress his statement made at DCS. At the post-conviction hearing, Ms. Pettyjohn testified that Petitioner voluntarily gave a statement to DCS prior to any criminal investigation and that he was free to leave at any time during the process. The post-conviction court determined that "there would be no suppression of [Petitioner's statement]" even if a motion to suppress was filed. On appeal, Petitioner has failed to show that the failure of trial counsel to file a motion to suppress was ineffective assistance of counsel. This issue is without merit.

Petitioner did not prove any of his allegations by clear and convincing evidence. Petitioner has not proven that services rendered by his counsel were insufficient. He has likewise not proven that he would have gone to trial instead of pleading guilty, as required for him to be successful on his petition. The record amply demonstrates that Petitioner received the effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

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JERRY L. SMITH, JUDGE